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Bankruptcy and the Administrative State

by

ROBERT KENNETH RASMUSSEN*

The main challenge currently facing lawyers and lawmakers is integrating the public and private law regimes. These two systems start from different premises and often appear to conflict with one another.¹ Nowhere is this conflict more evident than in bankruptcy law. Although bankruptcy law is generally conceived to be a private law regime, the filing of a bankruptcy petition does not remove a debtor from the reach of public law: states attempt to force debtors to fulfill their obligations under the environmental laws;² banking authorities strive to impose their regulatory strictures on bank holding companies that have filed for bankruptcy;³ the National Labor Relations Board ("NLRB") still prosecutes unfair labor practice complaints against firms that have entered bankruptcy;⁴ the Secretary of Labor still seeks to enjoin firms from selling goods made by employees who were not paid the minimum wage;⁵ the public utilities commission continues to demand the right to approve structural changes contained in public

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1. These divergent premises can be seen by comparing the work of Professor Richard Epstein, who is perhaps the most ardent proponent of minimal governmental restraints on private ordering, with that of Professor Cass Sunstein, who argues for an explicit rejection of private ordering as the baseline for legal doctrine. Compare R.A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) and Epstein, *The Supreme Court 1987 Term: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 102-03 (1988) and Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953 (1984) with Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 408-11 (1989) [hereinafter Sunstein, *Interpreting Statutes*] and Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437-46 (1987) .

2. See, e.g., *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 504-06 (1986); *Penn Terra, Ltd. v. Department of Envtl. Resources*, 733 F.2d 267, 274 (3d Cir. 1984).

3. See *In re MCorp*, 101 Bankr. 483, 486-87 (S.D. Tex. 1989), *rev'd sub nom.* *MCorp Fin., Inc. v. Board of Governors Fed. Reserve Sys.*, 900 F.2d 852 (5th Cir. 1990).

4. See, e.g., *NLRB v. Superior Forwarding, Inc.*, 762 F.2d 695, 696 (8th Cir. 1985).

5. See *Brock v. Rusco Indus.*, 842 F.2d 270, 273 (11th Cir. 1988); *Donovan v. TMC Indus.*, 20 Bankr. 997, 1005-06 (N.D. Ga. 1982).

utility plans of reorganization;⁶ and the Department of Justice pursues recovery under the False Claims Act from bankrupt companies that have defrauded the federal government.⁷ In these situations, and in countless others, courts are called upon to reconcile what often are viewed as the competing claims of the bankruptcy process and those of the administrative state.

Bankruptcy theorists have yet to advance a normative explanation of the proper relationship between bankruptcy and the administrative state.⁸ The most complete model of bankruptcy advanced to date—the creditors' bargain model⁹—takes no account of the administrative state in attempting to formulate the basic principles of bankruptcy. This model relentlessly reduces all disputes between a debtor and its creditors to the private law paradigm of a private creditor suing the debtor.

In this Article, I integrate the administrative state into bankruptcy theory. I begin by delineating the creditors' bargain model, both to show its explanatory strength and to demonstrate its failure to consider the intrusion of public law in bankruptcy. Two important points emerge. First, the collective action problem that is at the heart of the creditors' bargain model only justifies preventing creditors from grabbing the debtor's assets; it does not justify resolving disputes between debtor and creditor in the bankruptcy forum. The justification for resolving such disputes in a particular forum is based strictly on a cost-benefit analysis: given that there are at least two possible forums for hearing the dispute, the cheaper forum should be used. The second point is that the creditors' bargain model assumes that bankruptcy courts are institutionally capable of resolving all nonbankruptcy disputes.

In Part II of this Article, I demonstrate the fallacy of this assumption. This Part canvasses the normative underpinnings of ad-

6. See, e.g., *In re Public Serv. Co.*, 108 Bankr. 854 (Bankr. D.N.H. 1989).

7. See, e.g., *In re Chateaugay Corp.*, 115 Bankr. 28 (Bankr. S.D.N.Y. 1988); *In re Commonwealth Cos.*, 80 Bankr. 162 (Bankr. D. Neb. 1987).

8. To date, the only work that draws on principles of administrative law in attempting to resolve questions in bankruptcy focuses exclusively on the utilities industry. See Eisenberg, *Bankruptcy in the Administrative State*, 50 LAW & CONTEMP. PROBS. 3 (1987). This Article, in contrast, focuses on the interaction of bankruptcy and administrative law with respect to all debtors. For a critique of the conclusions drawn by Professor Eisenberg, see *infra* note 79.

9. The principal developers of the creditors' bargain model of bankruptcy have been Professor Douglas Baird and Dean Thomas Jackson. See T.H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986) [hereinafter T.H. JACKSON, *LOGIC AND LIMITS*]; Baird & Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97 (1984) [hereinafter Baird & Jackson, *Corporate Reorganizations*]; Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982) [hereinafter Jackson, *Bankruptcy, Non-Bankruptcy Entitlements*].

ministrative law, showing that courts should respect agency decisions because of the institutional advantages agencies have in both expertise and political accountability. Unlike courts, agencies overtly are charged with choosing between competing policies based on their view of which policy is the best. This being the case, courts are institutionally incapable of replicating the decisionmaking processes of administrative agencies.

In the final Part of this Article, I craft a theory of bankruptcy that incorporates the administrative state. Using the insights of administrative law, the Article creates a framework for deciding when disputes should be resolved in bankruptcy and when they should be resolved in the nonbankruptcy forum. This framework differs significantly both from that suggested by the creditors' bargain model and from that found in existing case law. Whereas the creditors' bargain model too often would force disputes into bankruptcy by failing to account for the unique nature of the administrative state, existing law too often allows disputes to be resolved outside of bankruptcy by focusing on the motivation of the government rather than on concerns of institutional competence. By focusing on such concerns, my theory harmonizes the respective goals of bankruptcy and administrative law.

I. The Policies Underlying Bankruptcy Law

Federal bankruptcy law alters some of the rules governing the nonbankruptcy relationship between a debtor¹⁰ and its creditors. Outside of bankruptcy, a creditor has a number of means by which to extract payment from a recalcitrant debtor. She can, for example, demand the debtor repay the debt, refuse to deal further with the debtor until the debt is repaid, or threaten to tell the world that the debtor is a deadbeat. If these means of persuasion fail, the creditor can file a lawsuit against the debtor and, assuming the suit is successful, obtain a judgment lien and have the sheriff foreclose on the debtor's property. So long as the creditor does not steal the debtor's property, the principal limits on her methods of collection (at least where no consumer is involved) are those of her imagination.¹¹ The Bankruptcy Code

10. Technically, the Bankruptcy Code refers not to the "debtor" but rather to the "trustee" (when one has been appointed to run the firm), *see* 11 U.S.C. §§ 701-705 (1988), or the "debtor in possession" (when the old managers continue to operate the firm), *see* § 11 U.S.C. § 1101 (1988). For simplicity, I use the term "debtor" to refer to both entities.

11. Numerous federal and state laws limit creditors' means of collecting from consumers. *E.g.*, Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1922 (1988). For examples of state collection law, *see* CAL. CIV. PROC. CODE §§ 481.010-709 (West 1976) (describing various means of collection including attachment, wage garnishment, and liens, as well as detailing applicable exemptions); N.Y. CIV. PRAC. L. & R. arts. 62-71 (McKinney 1990) (detailing grounds and procedures for attachment and recovery of chattel).

radically constrains these various avenues of debt collection and forces creditors to pursue their claims in the bankruptcy forum.¹² Indeed, if a creditor pursues nonbankruptcy remedies after a bankruptcy petition has been filed, she can be forced to pay damages to the debtor.¹³ This alteration of the debtor-creditor relationship is one of the defining attributes of bankruptcy.

Although bankruptcy alters state debt collection law, many (perhaps most) nonbankruptcy rules governing the debtor's conduct remain intact. A debtor in bankruptcy may not sell cocaine, no matter how profitable this activity might be; it cannot get a court to order people to buy its wares, even though such an order might ensure profitability; nor can it force its employees to stay on the job, even if the loss of employees would doom the enterprise. The filing of a bankruptcy petition simply does not liberate a firm from all of the constraints that governed its behavior prior to the filing.¹⁴

Any systematic attempt to demarcate appropriate limits for bankruptcy law's alteration of nonbankruptcy rules must begin by identifying the policies of bankruptcy law. The creditors' bargain model of bankruptcy attempts to do so.¹⁵ It explains bankruptcy as a set of rules that creditors would agree upon were they able to do so.¹⁶ Though it provides significant insights into the nature of bankruptcy,¹⁷ this theory is also quite limited. It focuses exclusively on the relationship between the debtor and private creditors. To the extent that the creditors' bargain model acknowledges that the government might be a creditor, it forces the government into the private party paradigm. This section briefly explicates the creditors' bargain model, illustrating its explanatory power and exposing its limits.

The creditors' bargain model illuminates the problem which bankruptcy addresses by positing a world without federal bankruptcy law.¹⁸

12. See 11 U.S.C. § 362(a) (1988) (creditors stayed from recovering against debtor through nonbankruptcy means once petition has been filed).

13. *Id.* § 362(h).

14. See 28 U.S.C. § 959(b) (1988) (requiring the debtor to observe all state laws in managing the estate).

15. See D.G. BAIRD & T.H. JACKSON, *CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY* 39-42 (2d ed. 1990); T.H. JACKSON, *LOGIC AND LIMITS*, *supra* note 9, at 2-4.

16. See T.H. JACKSON, *LOGIC AND LIMITS*, *supra* note 9, at 10-19; Jackson, *Bankruptcy, Non-Bankruptcy Entitlements*, *supra* note 9, at 860.

17. These insights are acknowledged in Scott, *Through Bankruptcy with the Creditors' Bargain Heuristic*, 53 U. CHI. L. REV. 690, 692 (1986) (reviewing D.G. BAIRD & T.H. JACKSON, *CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY*, *supra* note 15); see also Eisenberg, *A Bankruptcy Machine That Would Go of Itself*, 39 STAN. L. REV. 1519, 1520-21 (1987) (reviewing T.H. JACKSON, *LOGIC AND LIMITS*, *supra* note 9).

18. See T.H. JACKSON, *LOGIC AND LIMITS*, *supra* note 9, at 8-10.

This world is not the product of academic speculation; it is the world in which the American economy operated for most of the nineteenth century.¹⁹ In this bankruptcy-free world, a creditor's ability to obtain repayment often depends on the means she can employ to collect the debt. In general, state law offers creditors a wide variety of collection remedies, from gentle persuasion to state assistance.²⁰

When the debtor is solvent, this debt collection system works reasonably well. The debtor will pay most of its debts in the ordinary course of business. Most firms willingly pay their debts when they are flush, either because they want to protect their reputations, or because they fear the use of more drastic debt collection measures. Occasionally, the debtor may dispute the existence of a debt. Such disputes, however, can be resolved through negotiation or, if necessary, in a court of law. Though the creditor, the debtor, or both may be dissatisfied with the substance of nonbankruptcy law (for example, tort claimants and defendants both may view substantive tort law as too unpredictable²¹), the procedures for enforcing nonbankruptcy entitlements are relatively efficacious.

Problems in the state law collection process arise when the debtor becomes insolvent and no longer has assets sufficient to cover its liabilities. The inevitable result of such a state of affairs is that astute creditors begin a race to collect on their debts. The cause for this race is found in the state collection law priority rules that govern the claims of competing creditors. These state collection laws provide that the basic priority rule among unsecured creditors²² is first-come, first-served.²³ The result of this rule is that those creditors who receive payment from an insolvent debtor walk away satisfied, while those who are not paid before the debtor's assets are exhausted are left with worthless claims. Since each creditor looks after only its own interests, each has an incentive to secure repayment before its fellow creditors, knowing that it will not be repaid if it is last in line. As soon as it

19. A brief description of bankruptcy law in the 19th century can be found in L.M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 269-75 (2d ed. 1985).

20. See *supra* note 11 and accompanying text.

21. For a discussion of the wide range in damage awards for similarly situated tort victims, and a suggested response to such variations, see Bovbjerg, Sloan & Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U.L. REV. 908 (1989).

22. In this summary, I do not deal with the role of secured creditors in the creditors' bargain model. For a normative treatment of such creditors, see Jackson, *Bankruptcy, Non-Bankruptcy Entitlements*, *supra* note 9, at 868-71; Baird & Jackson, *Corporate Reorganizations*, *supra* note 9, at 109-16. Recently, this treatment has been seriously questioned. See Baird & Picker, *A Simple Noncooperative Bargaining Model of Corporate Reorganizations*, 20 J. LEGAL STUD. 311 (1991).

23. See, e.g., N.Y. CIV. PRAC. L. & R. 5202, 5203, 5232, 5234(b) (McKinney 1990).

perceives the possibility that some creditors will not be paid, each creditor has a strong incentive to invoke available collection measures in an attempt to avoid being that unlucky soul.²⁴

Because all creditors have the same incentive, this first-come, first-served method eventually leads to the piecemeal liquidation of the insolvent debtor's assets. As each creditor rushes to satisfy its claim, the debtor can either voluntarily sell all of its assets, paying as many claims as possible with the proceeds, or refuse to pay its outstanding obligations. In the latter case, the creditors will force the involuntary sale of assets through state law collection proceedings. Either way, the result is the same—the debtor's assets are sold in a piecemeal fashion, giving the proceeds to those creditors who acted expeditiously, and leaving the remaining creditors with claims against a debtor who now owns no assets with which to satisfy their claims. Insolvency thus triggers a race for the debtor's assets, which ultimately divests the debtor of the control of these assets.

The mere fact that state law debt collection remedies lead to a race, however, does not justify a new set of rules. Races in and of themselves are not necessarily bad. Indeed, some creditor monitoring may be a beneficial constraint on debtor misbehavior.²⁵ In the insolvency context, however, the race to the debtor's assets may be contrary to the best interests of the creditors as a group. A firm's insolvency does not necessarily reflect on whether the firm's assets are being put to their most efficient use. The fact that a firm has liabilities that exceed its assets may not mean that those assets should be sold in a piecemeal fashion. Oftentimes a firm's assets are worth more as part of a going concern than they would be if sold separately.²⁶

The distinction between solvency and the value of a positive going concern has been highlighted by the current levels of corporate debt.

24. See T.H. JACKSON, *LOGIC AND LIMITS*, *supra* note 9, at 14-15.

25. For discussions of creditors as monitors of a debtor firm's actions, see Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 100-101 (1985); Jackson & Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1158-61 (1979); Levmore, *Monitors and Freeriders in Commercial and Corporate Settings*, 92 YALE L.J. 49, 68-75 (1982).

26. Such a surplus in value can result either from the synergistic effect of combining the debtor's assets or from the unique contribution made by current management. Distinguishing between these two types of contributions in a reorganization is the function of the absolute priority rule of 11 U.S.C. § 1129. The classic treatment of the absolute priority rule can be found in Blum, *The Law and Language of Corporate Reorganizations*, 17 U. CHI. L. REV. 565, 572 (1950). For a recent discussion of the rule, see Ayer, *Rethinking Absolute Priority after Ahlers*, 87 MICH. L. REV. 963, 999-1001 (1989); Baird & Picker, *supra* note 22, at 325-28. For an argument that the rule fails in its central purpose, see Baird & Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U. CHI. L. REV. 738, 746-47 (1988).

Many corporations that technically are insolvent because of their junk bond obligations undoubtedly should be kept intact. That Federated Department Stores (which owns Bloomingdale's) had more liabilities than assets does not mean the preferable course of action would have been to dissolve the company and sell its assets to third parties.²⁷

It is readily apparent that creditors, who are in effect the residual claimants of the insolvent company, are better off if firms with positive going-concern values are kept intact. They are better off because as a group they will receive more on their claims if the firm remains intact. To be sure, some creditors—the ones who would have won the race—may be worse off if the firm is kept intact. However, it is unlikely that a creditor who has lent to a number of firms will be first in line every time one of its debtors becomes insolvent. Because each creditor has only a limited probability of being first—a probability dependent on the number of other creditors—the expected value of its claim, on average, is maximized if firms with a going-concern surplus are kept together.²⁸ In contrast, the state law rule of first-come, first-served can lead creditors to dissipate the debtor's assets in a manner that runs counter to the interests of the group.²⁹

In addition to the possible loss of going-concern value, the race to the debtor's assets has a second cost: the cost of the race itself. The first-come, first-served nature of state collection law induces creditors to spend money to monitor both their debtors and their fellow creditors to ensure that they do not end up last in line should a debtor become insolvent. While monitoring of debtor behavior may be beneficial, monitoring the behavior of other creditors generally will be of little value. Because most, if not all, creditors presumably will act similarly, these expenditures will not ensure that the creditor wins the race, but simply that it has a chance to participate in it. Thus, these ex-

27. See *In re Federated Dep't Stores* (Bankr. S.D. Ohio May 31, 1991) (LEXIS, Bankr. library, Bankr. file, No. 743).

28. Even if there is no going-concern surplus, the creditors, to the extent they are risk averse, would gain from forced sharing. See T.H. JACKSON, *LOGIC AND LIMITS*, *supra* note 9, at 15.

29. It is unclear whether bankruptcy law preserves this surplus in an efficient manner. Current reorganization practice insists on the current creditors, rather than third parties, owning the firm after bankruptcy. See Baird, *The Uneasy Case for Corporate Reorganization*, 15 J. LEGAL STUD. 127, 138-39 (1986). It also is unclear whether such a policy is justifiable. Compare Jackson & Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditor's Bargain*, 75 VA. L. REV. 155, 164-67 (1989) with Adler, *Bankruptcy and Risk Allocation*, 77 CORNELL L. REV. (1992) (forthcoming). The best solution may be for firms to commit to a certain type of bankruptcy proceeding when they form. See Rasmussen, *The Efficiency of Chapter 11*, 8 BANKR. DEV. J. (1991) (forthcoming); Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy* (Aug. 1991) (working paper).

penditures do not make the creditors as a group any better off.³⁰

This state of affairs raises what is known as a collective-action problem.³¹ As a group, creditors would be better off if they knew that a firm with a positive going-concern surplus was going to remain intact even after it became insolvent and they acted accordingly. In this way, any going-concern surplus would be preserved for the creditors' benefit, and the money that would have been spent on the race would be saved. As the world exists outside of bankruptcy, however, each individual creditor has an incentive to seek immediate payment of its claim. The incentives of the individual thus run counter to the interests of the group. Put differently, if the creditors were to agree among themselves before their common debtor became insolvent that in the case of insolvency they would hold off on their collection efforts, they could increase the amount that they ultimately realize as a group.³²

Such an agreement, however, is unlikely to be consummated. First, the identity of a debtor's creditors is constantly changing. Second, even if all creditors recognize the fact that the debtor-business would be worth more if kept intact, they may not be able to negotiate such a solution. Each creditor will worry about binding all of the other creditors to the proposed agreement. There is little reason to agree to abstain from exercising your collection options if the other creditors will not agree to forebear from exercising theirs. Moreover, every creditor has an incentive to cheat: it can maximize its return if the other creditors forestall their collection efforts while it seeks payment in full. For the same reasons that cartels are notoriously unstable,³³ we would expect few creditors to reach an agreement among themselves to refrain from exercising their rights under state law.

The creditors' bargain model explains bankruptcy as the bargain that the creditors would strike to overcome this collective action problem in a world where bargaining is costless.³⁴ According to the terms

30. See T.H. JACKSON, *LOGIC AND LIMITS*, *supra* note 9, at 13; Jackson, *Bankruptcy, Non-Bankruptcy Entitlements*, *supra* note 9, at 861-64. This rationale must not be taken too far. Not all insolvent firms invoke the protection of the bankruptcy laws, therefore, some monitoring still will be necessary. However, to the extent that bankruptcy can be designed to attract firms with positive going-concern values, the marginal costs of the race should be reduced.

31. On collective action generally, see R. AXELROD, *THE EVOLUTION OF COOPERATION* (1984); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

32. See Jackson, *Bankruptcy, Non-Bankruptcy Entitlements*, *supra* note 9, at 866-67.

33. See R. BORK, *THE ANTITRUST PARADOX* 102-04 (1978) ("[E]ach firm will be severely tempted to take more sales at the higher price, letting the others make the sacrifice of holding price up by holding back on sales.").

34. T.H. JACKSON, *LOGIC & LIMITS*, *supra* note 9, at 10-19.

of the bargain, the variety of individual collection methods is replaced by a collective proceeding—bankruptcy—that allows creditors to overcome the collective action problem. Bankruptcy forces creditors into a single forum where, as a group, they can decide the debtor's future. Assuming it is properly structured, this collective proceeding maximizes the return to the creditors as a group. The race to the assets of state law is replaced by reasoned decisionmaking.³⁵

The creditors' bargain explanation of bankruptcy sketched so far works equally well regardless of whether the creditor is a private or public entity. It is not the status of the creditor that creates the collective action problem; rather, it is the fact that the creditor seeks money and knows that once the debtor becomes insolvent some creditors will not have their claims satisfied in full. Though the creditors' bargain model does not distinguish governmental creditors, this inattention does not detract from the argument that bankruptcy should solve the collective action problem caused by state law.

The explanation of bankruptcy offered thus far, however, is incomplete. It only justifies limiting creditors' collection remedies and forcing them to decide the debtor's fate in a collective forum. It does not, in and of itself, justify resolving disputes between the debtor and its creditors in the collective forum. One can imagine a world where claims against the debtor would be resolved outside of bankruptcy, while bankruptcy would address only the ultimate disposition of the debtor's assets.³⁶ For example, nonbankruptcy courts could decide whether the debtor had breached a contract with a creditor, and if so, what the appropriate damages should be. The bankruptcy court, meanwhile, would prevent a creditor from collecting on the judgment while all the creditors wrestled with the question of the proper disposition of the debtor's assets.

This approach, however, would have substantial costs.³⁷ First, it would delay the ultimate decision of what to do with the debtor's assets. The bankruptcy court would have to wait until the nonbankruptcy forum had decided which parties had valid claims against the debtor and thus should participate in deciding the debtor's fate. Second, the debtor might have a number of disputed claims. Resolving each claim in a different forum almost certainly would be more costly

35. *Id.*

36. See Jackson, *Translating Assets and Liabilities to the Bankruptcy Forum*, 14 J. LEGAL STUD. 73, 85 (1985) [hereinafter Jackson, *Translating Assets*] ("It would, of course, be possible to follow nonbankruptcy procedures by deferring disposition of the debtor's assets (or their proceeds) to any group that would share at or below the level of priority accorded the entity with the unliquidated claim.").

37. For a description of these costs, see *id.* at 84-86.

than resolving them all in a single forum. These costs could arise because different cases might involve common issues, time might be spent learning local rules, local counsel might have to be retained, and because of other similar circumstances. Third, and perhaps most important, the creditors probably would agree amongst themselves that truncated procedures for determining claims should be used when the debtor becomes insolvent. Litigation outside of bankruptcy, however, contains numerous procedures that are designed to ensure an accurate result. These procedures simply may not be worth their cost when, in the end, all claims will be paid off at only pennies on the dollar. For these reasons, which can be categorized loosely as administrative efficiencies, the creditors' bargain model posits that disputed claims should be resolved inside the collective proceeding.³⁸

To date, the administrative efficiency element of the creditors' bargain has not been examined critically. Such an examination reveals two points. The first is that these administrative efficiencies are a collateral benefit to the creation of the collective proceeding, rather than a justification for such a proceeding in the first instance. The fact that a single forum may be efficacious in resolving multiple disputes cannot, in and of itself, justify the creation of the bankruptcy forum. Firms outside of bankruptcy often will have multiple suits pending against them at any one time. Some of these firms will be unable to pay in full all judgments rendered against them. No one contends that these facts require that the multiplicity of currently existing forums be eliminated. Only after it is decided that we should have a collective proceeding does one reach the question of what should be decided in that proceeding.

An example illustrates the point. Many firms produced asbestos, thereby subjecting themselves to substantial product liability claims.³⁹ These tort claims, which arose under state law, have involved these firms in litigation in a multitude of forums. Few would dispute that it would be cheaper for these firms if all of the claims were resolved in a single forum.⁴⁰ The fact that a single proceeding would be cheaper

38. See *id.* It is unclear whether bankruptcy as currently practiced achieves such savings. For an anecdotal view suggesting that it does not, see S. STEIN, *A FEAST FOR LAWYERS: INSIDE CHAPTER 11—AN EXPOSE passim* (1989).

39. The problem of the mass tortfeasor in bankruptcy has been examined in Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846 (1984); Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983); Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System*, 61 TEX. L. REV. 1297 (1983) (authored by Margaret I. Lyle).

40. In fact, the asbestos litigation outside of bankruptcy seems to be moving toward just

does not, of itself, indicate that all these firms, regardless of their solvency, should be in a collective bankruptcy proceeding. Once a collective proceeding exists, however, significant savings may be achieved by resolving disputed claims in the bankruptcy, rather than the non-bankruptcy, forum.

Moreover, that there may be significant savings from resolving disputes in the bankruptcy forum does not necessarily mean that such savings will result in every case. In some instances, the cost of proceeding in the nonbankruptcy forum actually may be less than having the dispute decided in the bankruptcy court. For example, the debtor and the creditor may have nearly completed litigating the case in the nonbankruptcy forum. If so, the cost of relitigating in the bankruptcy forum—even using abbreviated procedures—would outweigh any savings that could be generated. There is no bankruptcy reason for not allowing such a case to conclude in the nonbankruptcy forum. Thus, it is not necessarily true that all disputes involving a debtor should be resolved in the bankruptcy forum.

That it may be more efficacious to use the nonbankruptcy forum suggests that there should be merely a presumption that disputes between a creditor and a debtor who is already in bankruptcy ought be resolved in the bankruptcy arena. So long as creditors are restrained from enforcing their judgments, the primary goals of bankruptcy—ensuring the proper disposition of the debtor's assets and reducing the costs of the race to the debtor's assets—are served. Whether a given dispute should be resolved in bankruptcy turns on the respective costs of the competing forums. Thus, whereas staying all nonbankruptcy collection efforts is an integral part of the bankruptcy process, resolving all disputes between the debtor and its creditors in the bankruptcy forum is not.

The second point that an examination of the administrative efficiency argument reveals is that the creditors' bargain conception of bankruptcy assumes it is possible to resolve all nonbankruptcy disputes inside of bankruptcy. One merely asks whether it is cheaper to resolve the dispute in bankruptcy, not whether the bankruptcy court is institutionally competent to resolve it. This assumption derives from the model's persistent focus on the relationship between the debtor and its *private* creditors. With respect to such disputes, there is no reason to believe that a bankruptcy forum is any less capable of resolving the dispute than a nonbankruptcy forum. If both state and federal

such a consolidation. See *In re Joint Eastern and Southern Districts Litigation*, (E. & S.D.N.Y. 1991) (LEXIS, U.S. Dist. file No. 8956); *In re Joint Eastern and Southern Districts Litigation*, 132 F.R.D. 32 (E. & S.D.N.Y. 1990).

courts can decide contract disputes, the assumption runs, so can bankruptcy courts. The substance of the dispute is not tied to the forum in which it is resolved.

This assumption runs aground when the creditor is the government rather than a private party. In the next part of this Article, I explain the explicit link in administrative law between the substantive right at issue and the forum in which the dispute is resolved. I then apply this learning and produce a framework for resolving the problems that arise when public law becomes enmeshed in a bankruptcy proceeding.

II. The Policies of Administrative Law

The creditors' bargain model fails to recognize any meaningful difference between a private party pursuing a dispute against the debtor and the government doing so. This failure undermines any attempt by the creditors' bargain model to explain the appropriate treatment of the government as a creditor in bankruptcy. To correct this failing, it is necessary first to examine the way in which the government differs from a private creditor. This Part surveys administrative law in order to elucidate the concerns that arise when a bankruptcy court attempts to interfere with the relationship between the debtor and the government.

Perhaps the most striking feature of administrative law is its general lack of focus on the substance of agency action. Whereas tort law examines actual torts, and constitutional law the constitution, administrative law does not look at the substance of administrative action. This inattentiveness to actual results is hardly surprising in an area of law which encompasses such diverse agencies as the Environmental Protection Agency, the Federal Deposit Insurance Corporation, and the Department of Health and Human Services. Rather than focusing on the results of administrative decisionmaking, administrative law examines the process by which agencies reach their results and the deference this process should receive in the courts.⁴¹ This focus on process is perhaps best illustrated by the name of the statutory source for the basic principles of administrative law—the Administrative Procedure Act ("APA").⁴²

41. See Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 364 (1986) ("The central question [after the New Deal] became not *when* administrators could decide matters but *how* they should decide matters.") (emphasis in original).

42. 5 U.S.C. §§ 551-559, 701-706 (1988); see also Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 272 (1986) [hereinafter Sunstein, *Factions*] ("The legislative history of the APA shows almost no sign of interest in substantive issues of regulation.").

The importance of process in this context derives in large part from the rationale for the creation and continued existence of administrative agencies. The modern regulatory state began during the New Deal.⁴³ During that period of legal and economic upheaval, administrative agencies were designed to become experts in their fields of regulation.⁴⁴ With the advent of the industrial revolution, American society had become increasingly complex. In this complex environment, it was thought that it no longer was possible for the generalist legislature to implement its policy.⁴⁵ Nor were the courts institutionally equipped to deal with the complexity and velocity of change in modern society.⁴⁶ Therefore, it was necessary to have a group of experts whose long study of the subject to be regulated enabled them to implement the general directives of Congress.⁴⁷

These experts were to be apolitical, career bureaucrats.⁴⁸ They were to be implementors rather than instigators. Congress' role was to choose between conflicting goals, often representing a battle of differing ideologies, and thus identify the purpose for which agencies would be created.⁴⁹ Once Congress had discharged this function, it could retire from the arena and leave the expert administrators to study the field and settle on the appropriate policies to implement their Congressionally granted charter.⁵⁰ Only if Congress set forth the general goals to be achieved could the agency bring its specific expertise to bear on the subject matter.⁵¹ While agencies often made policy, these policies were to implement the general purpose established by Congress.

43. See B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 6-10 (1984); Sunstein, *Interpreting Statutes*, *supra* note 1, at 408-10.

44. James Landis was the primary proponent of this view of administrative agencies. See J. LANDIS, *THE ADMINISTRATIVE PROCESS* 23-31, 46, 154-55 (1938).

45. See *id.* at 23-24 ("The advantages of specialization in the field of regulatory activity seem obvious enough. . . . With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.").

46. See *id.* at 30-46.

47. See *id.* at 46 ("The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and legislative processes.").

48. See *id.* at 154.

49. See *id.* at 55 ("responsibility for fashioning a policy, not only of great economic importance but also one that has divided the faiths and loyalties of classes of people, cannot appropriately be intrusted [sic] to the administrative [process]").

50. But see *id.* at 55-57 (faulting Congress, in passing the Public Utility Holding Company Act of 1935, for turning over the "burning issue" of holding companies in the public utilities field to the FTC rather than resolving it in the first instance).

51. See *id.* at 56-57 (Congress had to lay out basic guidelines "before the problem was defined sufficiently for an administrative approach").

This technocratic concept of the role of an administrative agency has profound consequences for judicial review of agency action.⁵² The agency is not treated as a private party bringing its grievance before the court, which then decides the issue *de novo*. Rather, when an agency is acknowledged to be an expert in the field it regulates, the courts essentially admit that the agency is better positioned to make some judgments than the generalist court. For example, a court may be ill-equipped to second-guess the technical judgment of an agency.⁵³ Therefore, when an agency has been charged with administrative fact-finding in its area of expertise, a court should uphold its findings so long as they find some support in the record.⁵⁴ A rule promulgated under the agency's rulemaking authority also should receive minimum scrutiny, since the agency is much better able to determine whether the policy embodied in the rule promotes the congressional goal than is the generalist court.⁵⁵

These notions of agency expertise heavily influenced the standards of review set forth in the APA. Although the APA was enacted shortly after the end of the New Deal, it traces its roots back to that period.⁵⁶ The APA mandates that courts respect agency fact findings that are supported by substantial evidence.⁵⁷ It also requires that courts defer to agency decisions so long as they are not arbitrary, capricious, abuses of discretion, or contrary to law.⁵⁸ While the APA is by no means the

52. See *id.* at 143-44 ("If the extent of judicial review is being shaped, as I believe, by reference to an appreciation of the qualities of expertness for decision that the administrator may possess, important consequences follow."); Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1057 (1975) ("The premise that administrative agencies have a substantive expertise in their areas of regulatory responsibility was accepted by the courts and has become the basis of a considerable body of administrative law, particularly in the areas of primary jurisdiction and the scope of judicial review.").

53. See *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 865 (1984) ("[j]udges are not experts in the field"); *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 (1983) (when agency "is making predictions, within its area of expertise, at the frontiers of science . . . [judicial review] must generally be . . . 'most deferential'"); Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 388 (judges may be unlikely "to sympathetically understand the problems the agency faces in setting technical standards in complex areas").

54. See J. LANDIS, *supra* note 44, at 142 ("The positive reason for declining judicial review over administrative findings of fact is the belief that the expertness of the administrative, if guarded by adequate procedures, can be trusted to determine these issues as capably as judges."); Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 62 ("The argument based on the need for an expert adjudicator with adequate experience and information is a strong one.").

55. See J. LANDIS, *supra* note 44, at 147-48.

56. See generally Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 224-26 (1986).

57. 5 U.S.C. § 706 (1988).

58. *Id.*

last word on the scope of judicial review,⁵⁹ it engenders a deferential mood when it comes to judicial review of agency decisions.

The model of the agency as a neutral expert has come under heavy attack in the past twenty-five years. These attacks center on two areas. The first attack posits that agencies are not neutral because they are unduly influenced by certain types of interest groups.⁶⁰ Specifically, groups affected by the regulation at issue that are sufficiently concentrated have inordinate input compared to more diffuse groups. This influence may become so pervasive that the agency is said to be "captured" by the groups it is charged with regulating. This critique suggests that vigorous judicial review of agency procedures is necessary.⁶¹ It does not, however, counsel abandoning notions of judicial deference to agency expertise.⁶² Rather, it posits that there are reasons why agencies may not exercise their expertise and that, accordingly, courts should defer only if satisfied that the agency has considered all relevant factors and brought its expertise to bear on the problem.

The second attack on the New Deal conception of the administrative agency is more fundamental. Rather than challenging the implementation of the "expert" model of agency action, it argues that the model does not reflect reality. This critique denies that it is possible for a neutral expert to implement the will of Congress. This inability arises from the fact that, in the modern regulatory state, Congress does not make basic policy decisions and leave their implementation to administrative agencies. Instead, it often simply identifies the relevant, and usually competing, policies for the agency to consider.⁶³ Selection

59. See Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 353-55 (1986) (although codified in statute, these provisions retained the plasticity of judge-made law, and as a result, it is not surprising that after forty years their accepted meaning differs from the 1946 understanding).

60. See Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243, 248-50 (1978); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1226-27 (1982); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-87 (1975).

61. For example, courts should: take a "hard look" to ensure that agencies have considered only appropriate factors, Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 181-84; allow statutory beneficiaries to challenge regulatory activities, Stewart & Sunstein, *supra* note 60, at 1202-20; and graft new procedures onto the APA to ensure that administrative agencies engage in a "genuine dialogue" on the issues, NRDC v. Nuclear Regulatory Comm'n, 547 F.2d 633, 653 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

62. For an attack on the notion that agencies possess an expertise which gives them institutional advantages over courts, see Gillette & Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1088-89 (1990).

63. See Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1244-50 (1989); Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 380-85 (1989).

among these competing policies thus devolves upon the agency. Thus, it is naive to posit, as the New Dealers did, that agencies simply choose the appropriate means to implement Congress' command. According to this view, administrative agencies are making the very policy choices their New Deal defenders thought should be made by Congress.⁶⁴

Strangely enough, this second attack on the New Deal view of the agency has not led to a decrease in judicial deference to agency decisionmaking. Instead, it has changed the conception of the agency, and, in so doing, led to increased judicial deference. To be sure, the agency is still acknowledged to have expertise,⁶⁵ but the conception of the agency has changed from that of an expert technocrat implementing congressionally selected goals to that of a reasoned decisionmaker selecting among competing goals.⁶⁶ Now the justification for deferring to agency decisions stems in large part from notions of political accountability: the agency decisionmaker is accountable to the President, who is in turn accountable to the people. While this link is somewhat attenuated, it is stronger than that between the judiciary and the people. According to this view, when Congress has left room for policy judgments, courts should acknowledge the agency as the more legitimate body to make those judgments.⁶⁷

Perhaps the most dramatic shift in the conception of the agency has been in the treatment of an agency's interpretation of the laws that it has been charged with implementing. Under the expertise model, the deference given to the agency's interpretation turns on a number of factors related to whether the agency's expertise adds anything to the question at hand.⁶⁸ Courts have found, for example, that deference to an agency interpretation is warranted where the interpretation has been reexamined and affirmed on repeated occasions.⁶⁹ In contrast,

64. See Stewart, *Reformation of Administrative Law*, *supra* note 60, at 1681-84.

65. See, e.g., *Pauley v. Bethenergy Mines* 111 S. Ct. 2524, 2534-35 (1991); *Rust v. Sullivan*, 111 S. Ct. 1759, 1767-69 (1991); *Martin v. Occupational, Safety and Health Review Comm'n*, 111 S. Ct. 1171, 1176-77 (1991); *Board of Governors Fed. Reserve Sys. v. Investment Co. Inst.*, 450 U.S. 46, 56-57 n.21 (1980) (citing *Board of Governors v. Agnew*, 329 U.S. 441, 450 (1947)).

66. See Sunstein, *Factions*, *supra* note 42, at 281-92.

67. See Pierce, *supra* note 63, at 1254; Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990).

68. See *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (noting that deference is due to contemporaneous construction of a statute by those who are experts in the area); see also Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 985-86 (1988) (it is appropriate and does not violate article III for courts to defer to administrative interpretations in the area of the agency's expertise).

69. See, e.g., *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Chemehuevi Tribe v. Federal Power Comm'n*, 420 U.S. 395, 410 (1975); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

the Supreme Court has used the decisionmaker model to accord substantial deference to all administrative interpretations, regardless of the extent to which they draw on agency expertise.

The lead case reflecting this shift is *Chevron U.S.A. v. Natural Resources Defense Council*.⁷⁰ In *Chevron*, the Supreme Court faced a challenge to the validity of the Environmental Protection Agency's ("EPA") interpretation of the word "stationary source" in an environmental statute.⁷¹ Under the Carter administration, the EPA had adopted one interpretation of this statutory term; under the then newly elected Reagan administration, it had adopted another.⁷² In passing on the challenge to the new interpretation, the Court set forth a two-step test for assessing the validity of the EPA's, or any agency's, interpretation.⁷³ First, the interpretation will not be followed if Congress "addressed the precise question at issue," and the agency failed to heed the will of Congress.⁷⁴ Second, if Congress did not address the matter, the court must respect the agency's interpretation so long as it is reasonable.⁷⁵ In other words, if the statute reasonably could be interpreted in more than one way, the agency, rather than the court, selects the appropriate interpretation.

While the Court did mention agency expertise as justifying this deferential standard,⁷⁶ the driving force behind its adoption of this broad deference is the notion of political accountability:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute⁷⁷

The agency's relatively close ties to the electorate thus justifies the agency's making the necessary policy choices involved in interpreting an ambiguous statute.⁷⁸

70. 467 U.S. 837 (1984).

71. *Id.* at 840.

72. *Id.* at 857-859.

73. *Id.* at 842-43.

74. *Id.*

75. *Id.* at 843.

76. *Id.* at 865; see also *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2679 (1990) ("This practical agency expertise is one of the principal justifications behind *Chevron* deference.").

77. *Chevron*, 467 U.S. at 865-66.

78. Perhaps the most remarkable aspect of the *Chevron* doctrine is the discontinuity it creates between executive and judicial interpretative practices. Once a statute is found to be ambiguous, the executive agency is free to choose between the competing interpretations based on what it conceives to be good policy. Indeed, this is the type of interpretative practice

A central principle of modern administrative law, then, is that determination of certain issues is left in the first instance to administrative agencies, subject to deferential, though meaningful, review by the courts. From this it follows that when administrative agencies rather than private creditors are involved, one cannot separate substantive rights from the forum in which those rights are decided. There often are a number of alternatives available to an agency in any given situation, whether it involves a finding of fact, an interpretation of law, or the implementation of policy. The expertise and the decisionmaker models of agency both require that the responsibility for choosing among alternatives be left to the agency.

This responsibility has profound consequences for integrating the administrative state into bankruptcy theory. As shown above, the creditors' bargain model assumes that bankruptcy courts are institutionally capable of resolving all disputes involving the debtor. But one of the central tenets of administrative law is that the agency, rather than the court, must make a decision in the first instance. Bankruptcy courts thus cannot simply resolve a dispute between the debtor and the government that under nonbankruptcy law would be resolved first by the agency. The easy translation of nonbankruptcy entitlements into the bankruptcy forum assumed by the creditors' bargain model simply does not exist in the administrative context. In the next Part, I take account of this difficulty and integrate the administrative state into bankruptcy theory.

III. Integrating the Government into Bankruptcy Theory

With the normative underpinnings of bankruptcy and administrative law firmly in place, I now explicate the appropriate relationship between these two bodies of law.⁷⁹ At the outset, it is helpful to note

realists once urged courts to undertake. See, e.g., Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581 (1940). While administrative agencies currently follow this prescription, the Supreme Court now engages in highly formalistic reasoning in interpreting a statute to create a definite answer where none exists. For an example of such reasoning in the bankruptcy context, see Justice Scalia's opinion for a unanimous Court in *United Savings Ass'n v. Timbers of Inwood Forest Ass'n*, 484 U.S. 365 (1988). For an analysis of this trend, see Zeppos, *Justice Scalia's Textualism: The "New" Legal Process*, 12 CARDOZO L. REV. 1597, 1614-20 (1991).

79. The analysis that follows differs dramatically from that offered by Professor Theodore Eisenberg. Professor Eisenberg focuses on the problem of access to the administrators, see *supra* notes 60-62 and accompanying text, and asks whether the bankruptcy process can alleviate this problem. See Eisenberg, *supra* note 8, at 22-28. This problem of agency bias, however, is not a bankruptcy problem, but one of administrative law. Nonbankruptcy courts have wrestled with this problem, and there is no reason to believe that the purposes of bankruptcy—solving the collective action problem and reducing strategic costs—provide any insight into the proper solution of agency bias.

that a governmental entity can pursue a debtor for liabilities arising from conduct that the debtor engaged in during one of three discrete time periods: before the filing of the bankruptcy petition; after the bankruptcy filing but before the end of the bankruptcy proceeding; and after the completion of the bankruptcy proceeding. In this Part of the Article, I first examine the polar cases of post-bankruptcy and pre-bankruptcy actions, and then conclude with the intermediate case of action taken during the bankruptcy process itself. In assessing the appropriate bankruptcy law response to government action in each of these periods, each section begins by examining the usual situation—the proper treatment of a private creditor—and then determines the extent to which the unique nature of the governmental claim requires a change in analysis. Each section then compares this normative framework both to the actual language of the Bankruptcy Code and to court decisions interpreting this language.

In examining the relationship between bankruptcy and the administrative state, two questions should be kept separate. The first is the extent to which bankruptcy should relieve a debtor from complying with nonbankruptcy law. The second is in which forum the dispute between the debtor and government should be resolved. These questions clearly are distinct and should remain so. The reason for asking the first question flows from the primary justifications for bankruptcy—preventing a destructive race to the debtor's assets and reducing monitoring costs. The creditors' bargain model of bankruptcy adequately addresses this question. It identifies the goals of the collective proceeding and posits that bankruptcy should change non-bankruptcy law only to the extent necessary to achieve these purposes.⁸⁰

Bankruptcy law by its nature changes certain nonbankruptcy law rules. For example, secured creditors are stayed from foreclosing on their collateral and thereby removing the assets from the debtor's operations. Changes such as this create the risk that a party (either a debtor or a creditor) will file for bankruptcy solely to take advantage of the change in rules. In other words, parties will engage in forum shopping. The more rules that are changed, and the more profound the changes, the greater the incentive to do so.⁸¹ Therefore, the rules that bankruptcy law can change should be limited. When such changes

80. See T.H. JACKSON, *LOGIC AND LIMITS*, *supra* note 9, at 21-27; Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 816-22 (1987).

81. Forum shopping has been almost universally condemned. See, e.g., Baird, *supra* note 80, at 824-28; Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 641 (1974). For an argument that forum shopping may be unobjectionable under certain circumstances, see Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

promote the goals of the collective proceeding—proper disposition of the debtor's assets, reduction of strategic costs, and reduction of administrative expenses—they should be allowed. When such changes do not promote these goals, they should not.⁸²

This preference for nonbankruptcy law does not mean that that law is perfect. One legitimately can question whether a debtor's involuntary creditors, such as tort claimants, should be treated the same as the debtor's voluntary unsecured creditors, such as its trade creditors.⁸³ This concern, however, is not a bankruptcy issue. Improving the position of tort claimants relative to other unsecured creditors in bankruptcy would create an incentive for those benefitting from such a change to force an insolvent debtor into bankruptcy's federal forum. To be sure, some may argue that the incentive provided by any single rule change is minimal, but this response misses the point. If we already have one set of priority rules, those wishing to change those rules in bankruptcy must explain not only why they should be changed in bankruptcy, but also why they should not be changed outside of bankruptcy.⁸⁴

While the creditors' bargain model adequately identifies the extent to which nonbankruptcy law should be changed in bankruptcy, it fails to resolve satisfactorily the second question: which forum should resolve the dispute between the debtor and the government. This question, which generally is more difficult than deciding whether nonbankruptcy law should be altered, derives from the rationale for forcing private creditor disputes into the collective proceeding. As we saw in Part I, it is the administrative efficiencies of reducing delay, reducing the number of forums, and reducing the costs of resolving disputes that justify resolving disputed claims inside the bankruptcy

82. For an application of this analysis to the problem of how to treat retiree medical benefits in bankruptcy, see Keating, *Good Intentions, Bad Economics: Retiree Insurance Benefits in Bankruptcy*, 43 VAND. L. REV. 161 (1990).

83. For a suggestion along these lines, see Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times*, 36 STAN. L. REV. 1045, 1079-80 (1984) (authored by Christopher M.E. Painter).

84. Using nonbankruptcy law entitlements as the baseline for bankruptcy entitlements is hardly controversial. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 351-352 (1985) (corporation's attorney-client privilege controlled by actor whose role approximates that of management outside of bankruptcy); *Ohio v. Kovacs*, 469 U.S. 274, 286 (1985) (O'Connor, J., concurring) ("[T]he classification of Ohio's interest as either a lien on the property itself, a perfected security interest, or merely an unsecured claim depends on Ohio law."); Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1035 (1953) ("apparent purpose" of federal bankruptcy laws is to provide a system for the effectuation of state-created rights); Comment, *Waiver of the Attorney-Client Privilege by the Trustee in Bankruptcy*, 51 U. CHI. L. REV. 1230 (1984) (authored by William R. Mitchelson, Jr.) (anticipating *Weintraub* analysis).

forum. Here, the unique nature of the government dramatically alters the calculus of whether disputes with the debtor should be resolved inside or outside of bankruptcy.⁸⁵ The remainder of this Article examines the three times during which a claim involving the government can arise and integrates normative underpinnings of the administrative state into bankruptcy theory. In doing so, it contrasts that treatment with the treatment provided a private creditor.

A. Postbankruptcy Actions

In this section, I resolve, at a theoretical level, the proper interface between bankruptcy and administrative law when the action at issue occurs after the bankruptcy case has been concluded. I then measure extant law against this normative framework.

(1) *Bankruptcy Theory*

The easiest case to analyze is one in which the debtor has completed the bankruptcy process.⁸⁶ It is clear that any disputes that arise between the reorganized firm and a postbankruptcy creditor should be resolved in the applicable nonbankruptcy forum. Once the debtor emerges from a Chapter 11 proceeding under a plan of reorganization,⁸⁷ bankruptcy presumably has fulfilled its purpose. The bankruptcy proceeding has rearranged the capital structure of a firm, which should be kept intact. To be sure, the reorganized entity might find it advantageous to use the bankruptcy forum for future dispute resolution. But there is no longer a collective action problem justifying the use of the bankruptcy forum in the first instance. After the need for such a forum is removed, the fact that it might be efficacious in resolving disputes is of no moment.

85. Congress has recognized that in some instances the benefits of having disputes decided in a single forum are outweighed by other interests. See 28 U.S.C. § 1334(c)(1) (1988) (allowing district courts to exercise discretion in deciding whether to abstain from deciding Title 11 questions in the interests of justice, comity with state courts, or respect for state law); *Id.* § 1334(c)(2) (requiring district courts to abstain in one type of case). For a general explanation of the abstention doctrine as it has developed outside of bankruptcy, see Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989).

86. Of course, not all debtors emerge from bankruptcy. Many have their assets liquidated under Chapter 7 of the Code. See 11 U.S.C. §§ 701-766 (1988). The analysis in the text applies with equal force to the issue of whether the buyer of a debtor's assets in a Chapter 7 liquidation should be treated differently than a party who bought such assets outside of bankruptcy.

87. It is conceivable that an ongoing firm could emerge from a Chapter 7 liquidation as well. See Baird, *The Uneasy Case for Corporate Reorganization*, 15 J. LEGAL STUD. 127 (1986).

There is no reason to alter this conclusion when the focus shifts from the private creditor to a governmental entity. Regardless of the identity of the creditor, once the debtor emerges from bankruptcy, bankruptcy's purpose has been fulfilled. The owners of the debtor-firm have agreed to continue the business and have reorganized the firm's capital structure. There is nothing in the collective action problem which suggests that this debtor should be able to retreat to the bankruptcy forum after the reorganization effort is complete.

(2) *The Code and Case Law*

By and large, the Bankruptcy Code as written comports with this limitation on the right to return to the bankruptcy forum. Section 350(a) provides that the bankruptcy court shall end the bankruptcy case once the "estate is fully administered and the court has discharged the trustee."⁸⁸ Thus, once the bankruptcy purpose of deciding the proper disposition of the debtor's assets is complete, the bankruptcy court's involvement in the affairs of the debtor ceases.

To be sure, Section 350(b) allows a bankruptcy court to reopen a closed case in order "to administer assets, to accord relief to the debtor, or for other cause."⁸⁹ To the extent that this provision is read simply to allow the bankruptcy court to correct oversights that it may have made in administering the estate or to allow the court to interpret a disputed portion of the plan of reorganization, it is unobjectionable. Indeed, when viewed in this way it is analogous to Rule 60(b) of the Federal Rules of Civil Procedure.⁹⁰ Both provisions allow a court to revisit settled litigation in order to address an issue which should have been addressed in that litigation.

One could argue that the "for other cause" language of Section 350(b) allows the court to reopen the case for any reason, including the resolution of a postpetition dispute between the debtor and a new creditor. This argument has little appeal, however. Open-ended provisions in the Code should be read as supplements to the Code's more detailed provisions, not as invitations for courts to set the world aright.⁹¹

88. 11 U.S.C. § 350(a) (1988).

89. *Id.* § 350(b).

90. *See* FED. R. CIV. P. 60(b) (allowing relief from final judgment for mistake, inadvertence, surprise, excusable neglect, new evidence, satisfaction, or "any other reason justifying relief").

91. *See In re Chicago, Milw., St. P. & Pac. R.R.*, 791 F.2d 524, 528 (7th Cir. 1986) (Bankruptcy Code "does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness"); *Boston & Maine Corp. v. Chicago Pac. Corp.*, 785 F.2d 562, 566 (7th Cir. 1986) (court's discretion does not allow it to use its view of equity to expand the reach of the Bankruptcy Code).

There is no indication that by providing flexibility in Section 350(b) Congress intended to allow bankruptcy courts to move beyond the paradigmatic reopening case.

To date, the courts have read Section 350(b) consonant with this limitation. The cases invoking the statute's "for cause" language consistently involve disputes that should have been addressed in the original proceeding.⁹² Both the Code and the case law thus adhere to the theoretical conclusion that bankruptcy does not provide a forum for resolving postbankruptcy disputes.

B. Prepetition

Most of the disputes in bankruptcy arise from the debtor's conduct before the bankruptcy filing. In this section, I explore the problems which arise between the debtor and the government based on the debtor's prepetition actions. As in the preceding section, I first explicate the proper theoretical response to these problems and then canvass extant law.

(1) *Bankruptcy Theory*

As previously noted, the filing of a bankruptcy petition should not change the substantive law that defines whether a creditor has a claim against the debtor.⁹³ The more difficult question relates to choosing the proper forum in which to resolve the dispute between the creditor and the debtor. The creditors' bargain model suggests that, as a general matter, disputes between the debtor and its private creditors should be resolved in the bankruptcy forum.⁹⁴ As previously discussed,⁹⁵ although this result does not flow directly from the collective action problem justifying the creation of bankruptcy, it creates certain administrative savings over resolving the disputes in the nonbankruptcy forum. These savings consist of avoiding undue delay, resolving all disputes in a single forum, and using abbreviated procedures to determine claims.⁹⁶

92. See, e.g., *In re Frontier Enter., Inc.*, 70 Bankr. 356 (Bankr. C.D. Ill. 1987) (court reopened case to correct an obvious error in the distribution of the proceeds of the estate); *In re Mesta Mach. Co.*, 67 Bankr. 147 (Bankr. W.D. Pa. 1985) (court reopened case to provide for an accounting of funds given to a creditors' committee for its work in the bankruptcy proceeding).

93. See *supra* notes 81-84 and accompanying text.

94. See *supra* notes 36-41 and accompanying text.

95. *Id.*

96. *Id.*

However, the cost-savings rule that prepetition disputes generally be resolved in the bankruptcy forum does not require that all prepetition disputes between a debtor and a private creditor necessarily be resolved there. One readily can imagine situations in which administrative savings will not obtain. For example, consider the case of a debtor who is one defendant in a suit involving multiple parties, and the suit is nearing completion in the nonbankruptcy forum. The gains created by resolving the dispute with the debtor in the bankruptcy forum may be offset by forcing the creditor to undertake duplicative litigation. To be sure, the debtor may expend less money; but the creditor now will face two proceedings—one inside of bankruptcy against the debtor, and one outside of bankruptcy against the remaining nonbankruptcy defendants. Moreover, given that the nonbankruptcy suit is nearly complete, it may be cheaper to let it reach its conclusion before beginning even the truncated bankruptcy proceeding. Stated differently, the sunk costs of the nonbankruptcy proceeding may exceed the savings generated by using the bankruptcy forum.

Thus, in the case of the private creditor there should be a presumption—not an absolute rule—that such disputes will be resolved in the bankruptcy forum. The only justification for the bankruptcy court deferring to nonbankruptcy proceedings is that the nonbankruptcy proceeding has advanced so far that it would be cheaper for all involved to let the nonbankruptcy forum resolve the issue. The creditors' bargain model, with its relentless focus on the private creditor relationship, thus suggests a simple baseline: disputes involving the prepetition conduct of the debtor should be resolved inside of bankruptcy.⁹⁷ Only a showing that the nonbankruptcy forum is more efficacious justifies deviating from this baseline.

The situation is not so simple, however, when it is the government pursuing the debtor based on the debtor's prepetition conduct. In this case, it is necessary to draw on the insights of administrative law to determine the proper approach. Oftentimes, government action begins in the administrative arena. For example, where a debtor is charged with committing unfair labor practices prior to filing for bankruptcy, the complaint first is heard by the NLRB.⁹⁸ Similarly, a person who believes he has been illegally discriminated against must file an administrative complaint with the Equal Employment Opportunity Com-

97. See T.H. JACKSON, *LOGIC AND LIMITS*, *supra* note 9, at 44-46. While Professor Jackson recognizes the reasons for resolving disputed claims in bankruptcy, he fails to recognize that such a resolution should be a presumption rather than an invariable rule.

98. See National Labor Relations Act, 29 U.S.C. § 160(b) (1988).

mission as a prerequisite to bringing suit under Title VII.⁹⁹

A situation in which the initial forum is an administrative one, differs fundamentally from one involving a private creditor. Recall that there is a crucial distinction between forcing all collection efforts into bankruptcy's collective proceeding, and resolving all disputes involving the debtor in such a proceeding. While the first of these approaches partakes of the justification for bankruptcy, the second follows only after it is decided such a proceeding is warranted. In forcing the private creditor to resolve its dispute in the bankruptcy forum, the implicit assumption is that the bankruptcy court can resolve the dispute competently. Of course, there are no guarantees that the bankruptcy court will decide every nonbankruptcy dispute that comes before it correctly. Yet, so long as the court is not biased in its errors, the gains made by having the dispute resolved in bankruptcy presumably will exceed the cost of any errors it might make.¹⁰⁰ In other words, the nonbankruptcy dispute easily can be transferred to the bankruptcy proceeding.

This is not the case with the administrative proceeding. Replacing an administrative proceeding with a bankruptcy proceeding is not the same as replacing one judge with another. The lack of transferability flows from the normative justification for administrative agencies. The modern conception of agencies is that they are superior to courts because of their expertise and political accountability.¹⁰¹ Transferring the dispute from the administrative forum to the bankruptcy arena results in a loss of the agency's expertise. The agency is better positioned to decide the facts and apply the law in the first place than is the non-expert bankruptcy court. If we were to consider only the loss in expertise, the choice between allowing the dispute to continue in the administrative arena and forcing it into the bankruptcy forum would require a careful weighing of the cost of the loss of expertise against the gain of expedience.¹⁰² This calculation is similar to the one that a bankruptcy court makes in the case of a private creditor when it decides whether to replace the nonbankruptcy forum's procedures with those of the bankruptcy court. The less technical the problem at issue, the more likely it would be decided by the bankruptcy court rather than the agency.

99. 42 U.S.C. § 2000e-5(f)(1) (1988); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973) (filing administrative claim is prerequisite to suit).

100. See T.H. JACKSON, *LOGIC AND LIMITS*, *supra* note 9, at 44-46.

101. See *supra* notes 43-69 and accompanying text.

102. To the extent that the administrative agency is more efficient at resolving disputes than the courts are, this potential gain will be reduced.

Such a weighing process, however, would fail to account for the loss of the agency's greater political accountability. Because of this accountability, courts routinely defer to the agency's policy judgment where Congress has delegated that determination to the agency. When this factor is added to the analysis, it becomes clear that the bankruptcy court (or any court for that matter) cannot be treated as a substitute for an administrative agency. The bankruptcy court simply is not equipped to replicate the agency's ability to weigh competing policy concerns. Having the court engage in such a process would ignore the basic justification for agencies.

This problem is, perhaps, best illustrated by the NLRB,¹⁰³ an agency whose actions frequently intersect with the bankruptcy process.¹⁰⁴ The NLRB is one of the few federal agencies that makes policy through adjudication rather than rulemaking.¹⁰⁵ Often such adjudication involves the application of a very general statute to a new situation. Under *Chevron*, it is up to the NLRB to weigh the competing concerns of labor and management and reach an appropriate solution. In this situation, it is impossible to imagine that nonbankruptcy rights will be respected inside a bankruptcy proceeding. The substance of the nonbankruptcy law cannot be divorced from the forum in which the initial determination of rights is made, and thus transfer to the bankruptcy forum would necessarily involve a change in the substance of the law at issue.

Once the cost of transferring the dispute from the administrative arena to the bankruptcy forum is understood, it becomes apparent that the benefits ordinarily gained from resolving disputes in bankruptcy pale in comparison. It is true that deferring to an administrative proceeding may force a debtor to litigate in more than one forum. However, the savings of proceeding in a single forum as opposed to a

103. The general principles of deference to administrative agencies discussed in Part II are applied to the NLRB in Winter, *supra* note 54.

104. See, e.g., NLRB v. Bildisco & Bildisco, 465 U.S. 513, 521-34 (1984) (treatment of collective bargaining agreements under Bankruptcy Code); NLRB v. Better Bldg. Supply Corp., 837 F.2d 377, 378-79 (9th Cir. 1988) (NLRB damage award survived Chapter 7 proceeding); *In re Ionosphere Clubs, Inc.*, 114 Bankr. 379, 389-402 (Bankr. S.D.N.Y.) (finding actions to enforce collective bargaining not automatically stayed under § 362), *aff'd in part and rev'd in part*, 922 F.2d 984 (2d Cir. 1990).

105. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294-95 (1974). The NLRB's reluctance to engage in substantive rulemaking has been widely criticized. See NLRB v. Majestic Weaving Co., 355 F.2d 854, 859-61 (2d Cir. 1966) (opinion by Friendly, J.); Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 260 (1968). The NLRB recently has begun to make use of its rulemaking power in certain circumstances. See, e.g., American Hosp. Ass'n v. NLRB, 899 F.2d 651, 653 (7th Cir. 1990) (NLRB rule recognizing eight separate bargaining units in the acute-care hospital industry).

multiplicity of forums is proportionate to the number of additional forms and, accordingly, the cost of just one additional forum should be minimal. Moreover, the advantages of truncated bankruptcy proceedings do not loom large in comparison to those of agency proceedings. Many agencies already have streamlined proceedings.¹⁰⁶ Finally, it is unlikely that deference to the administrative forum would unduly delay the completion of the bankruptcy proceeding. There is no reason to believe that the bankruptcy proceeding generally would conclude before the administrative one. Though it is likely that in the case of private creditors pursuing a number of suits, the resolution of some of these disputes by nonbankruptcy means would take longer than the bankruptcy proceeding, this would not appear to be true where there is only one other proceeding at issue. With only two relevant proceedings, it often will be the case that the administrative proceeding will end before the bankruptcy proceeding does. Moreover, given that the number of nonbankruptcy proceedings presumably would be few, the bankruptcy court easily could take them into account through such means as contingent treatment of the dispute.¹⁰⁷

In sum, explicit consideration of the administrative state with respect to bankruptcy theory leads to a result radically different than that generated by the creditors' bargain model. In situations where a court reviewing agency action would have to defer to the judgment of the agency, the filing of a bankruptcy petition should not preclude the agency from proceeding against the debtor.¹⁰⁸ The administrative arena should resolve the dispute unimpeded by the bankruptcy process.¹⁰⁹

106. See, e.g., 29 C.F.R. §§ 6.15-6.19 (1990) (procedure for ensuring compliance with wage standards in federal contracts).

107. Contingent treatment is provided for by § 502(c). See 11 U.S.C. § 502(c) (1988). Under this provision, the court estimates the claim at issue and allows the nonbankruptcy forum to adjudicate it. See, e.g., *Bittner v. Borne Chemical*, 691 F.2d 134, 135-36 (3d Cir. 1982).

108. This conclusion applies with even greater force to those rare instances in which Congress has precluded judicial review of agency decisions. For examples of such preclusions, see *Schilling v. Rogers*, 363 U.S. 666, 669-77 (1960) (decisions of Director of Office of Alien Property, with respect to returning property acquired by the United States during wartime); *Work v. United States ex rel. Rives*, 267 U.S. 175, 178-82 (1925) (discretionary decisions of Secretary of the Interior to allow claims against the United States for losses incurred by private parties in support of war effort). In these situations, Congress has concluded that courts should play no role, and it is hard to imagine that any bankruptcy policy should override this congressional judgment.

109. This analysis applies with full force to the problem of arbitration in bankruptcy. Unions or individual employees often seek to enforce arbitration clauses contained in collective bargaining agreements. See, e.g., *In re Ionosphere Clubs, Inc.*, 114 Bankr. at 379, 379 (Bankr. S.D.N.Y.), *aff'd in part and rev'd in part*, 922 F.2d 984 (2d Cir. 1990); *In re Midwest Emery*

Up to this point, the analysis has focused on the situation in which the nonbankruptcy forum is an administrative forum. Government agencies, however, often pursue debtors in judicial forums as well. Once the focus shifts to this situation, the appropriate forum shifts as well. The reasons for not transferring the dispute into the bankruptcy forum evaporate. No longer is the bankruptcy court hamstrung by its lack of expertise or political accountability. There is no reason to believe that a bankruptcy court competent to apply nonbankruptcy law, such as contracts or constitutional law, could not ascertain and apply the basic concepts of administrative law as competently as any other court.

The proper treatment of disputes involving the government thus differs from that proposed by the creditors' bargain model. All pre-bankruptcy disputes should not be forced into the bankruptcy forum. Those disputes which, under nonbankruptcy law would have to be resolved in the first instance in an administrative forum—to which a reviewing court would have to give deference—should be resolved in such forums even though one of the parties has filed for bankruptcy. When a government agency proceeds in an ordinary, judicial non-bankruptcy forum, however, the dispute properly may be transferred to a bankruptcy forum.

Before measuring current law against this theory, one final area involving the government pursuit of a debtor merits discussion—the problem that arises when the government pursues a criminal prosecution against the debtor based on the debtor's prepetition conduct. When the government pursues an individual, there is a sharp practical distinction depending on whether the purported violation is civil or criminal. If it is criminal, the individual faces the possibility of incarceration. Because of this possibility, criminal cases against individual debtors should not be resolved in bankruptcy court. Bankruptcy's truncated procedures inevitably produce a variation in results from those produced by the more robust procedures commonly employed outside of bankruptcy. While such variations are acceptable when a court is resolving monetary claims, they are not acceptable where an erroneous decision could deprive a person of liberty.¹¹⁰ The

Freight Sys., 48 Bankr. 566, 569 (Bankr. N.D. Ill. 1985); *In re Smith Jones, Inc.*, 17 Bankr. 126, 127 (Bankr. D. Minn. 1981). Courts generally recognize that they are not institutionally capable of replicating the arbitration process. See *Eastern Air Lines, Inc. v. Air Line Pilots Ass'n Int'l*, 861 F.2d 1546, 1555 (11th Cir. 1988). For the same reason, these disputes should be resolved through arbitration rather than in the bankruptcy forum.

110. Few principles are more deeply ingrained in our law than Blackstone's comment that, in the criminal context, "the law holds that it is better that ten guilty persons escape than that one innocent suffer." 4 W. BLACKSTONE, COMMENTARIES *353.

corporate context does not implicate the same concerns. The government cannot jail a corporation. When the government pursues a corporation criminally, it seeks money. It therefore makes little sense not to resolve criminal proceedings against the corporation in the bankruptcy forum.

One might argue that this analysis overlooks an important point. Bankruptcy's truncated procedures are justified on the ground that, as long as any errors resulting from the lack of procedural protections are random, creditors as a group are better off trading these procedures for the elaborate ones that exist outside of bankruptcy. The creditors, however, may not wish to make this trade in the criminal context. A criminal conviction can have a stigmatizing effect on a business. Most people attach a value to abiding by the law, and many may simply decide not to do business with a known criminal. It may be that creditors would be better off employing the elaborate procedures than running the risk of improper stigmatization. To the extent the errors are random, however, creditors would benefit in those cases where the debtor would have been convicted had more elaborate procedures been used.¹¹¹ It follows that claims against the debtor based on alleged criminal law violations should not be treated differently than claims based on civil law violations.

(2) *The Code and Case Law*

The Code's treatment of the debtor's prepetition conduct, as a general matter, comports with the preceding analysis. The mechanism the Code uses for channelling claims based on the prepetition conduct of the debtor into the bankruptcy forum is the automatic stay provision of section 362.¹¹² Section 362(a)(1) deprives creditors of their various means of obtaining money from the debtor. It provides for a stay of "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the [filing of a bankruptcy petition]."¹¹³ It also bars any attempt to obtain property of the estate, or to collect on a debt which arose prior to the filing of a bankruptcy

111. As a practical matter, there may be constitutional limitations on the use of truncated procedures in the criminal context even when the defendant is a corporation. See *Ross v. Bernhard*, 396 U.S. 531, 533-34 (1970) (seventh amendment right to jury extends to corporations); *Minneapolis & St. L. Ry. v. Beckwith*, 129 U.S. 26, 28 (1889) (corporation is a "person" for purposes of fourteenth amendment).

112. 11 U.S.C. § 362 (1988).

113. *Id.* § 362(a)(1).

petition.¹¹⁴ This stay applies equally to governmental entities, regardless of whether they are considered "creditors" under the Code.¹¹⁵

The automatic stay, however, is neither monolithic nor absolute. Section 362(b) carves out certain exceptions from the broad brush of section 362(a). Two of these exceptions explicitly pertain to the government. One, the "(b)(1)" exception, excepts from the stay all criminal proceedings against the debtor.¹¹⁶ The second, the so-called "(b)(4)" exception, is the most litigated of all the stay exceptions. Section 362(b)(4) provides that the automatic stay does not reach "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."¹¹⁷ This exception extends only to the initiation and completion of judicial or administrative proceedings; it does not extend to the enforcement of a money judgment arising out of such proceedings.¹¹⁸

The justification for this limitation to the (b)(4) exception is readily apparent. Once the government's dispute with the debtor has been reduced to an order that the debtor pay money, the government is no different than a private creditor. Neither the agency's expertise nor its political accountability is relevant. It simply wants to receive payment from the debtor. The creditors' bargain model rightly suggests that no party should be able to collect on a judgment during a collective proceeding. To allow one party to do so, while staying the enforcement of all other judgments, would be tantamount to giving the unstayed party a priority that it does not enjoy outside of bankruptcy.¹¹⁹

Before analyzing the (b)(4) and (b)(1) exceptions, it is necessary to note the precise effect of an automatic stay. Sections 362(a) and (b) do not set absolute limits on creditor collection efforts; rather, they establish a baseline regarding which actions are to be stayed and which are not. With respect to those actions that are stayed, section 362(d) allows the bankruptcy court to lift the stay for "cause."¹²⁰

114. *Id.* § 362(a)(6). For the timing of when a claim arises under section 362(a), see Jackson, *Translating Assets*, *supra* note 36, at 82-83.

115. See 11 U.S.C. § 362(a) (1988); *id.* § 101(14) (defining "entity").

116. *Id.* § 362(b)(1).

117. *Id.* § 362(b)(4).

118. *Id.* § 362(b)(5).

119. Congress recognized this point when it enacted § 362(b)(5). See S. REP. NO. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5838 ("Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.").

120. 11 U.S.C. § 362(d) (1988).

Just as the Code empowers the bankruptcy court to lift an automatic stay, it also empowers the court to impose a stay where the automatic stay provision ordinarily does not apply. Section 105(a) authorizes the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code.]"¹²¹ Congress specifically contemplated that courts would "determine on a case-by-case basis [whether] a particular action . . . [that is] harming the estate should be stayed."¹²²

Thus, section 362 simply makes a rough cut at these matters. It delineates, at a general level, which types of actions should be stayed and which should not. The bankruptcy court, however, is always free either to lift or to impose a stay based on the facts of the case. The crucial issue to be addressed in these proceedings is whether the party and the dispute belong in the collective proceeding.¹²³

The test proposed above for handling government claims based on the prebankruptcy conduct of the debtor fits comfortably within this framework. The general presumption for all private creditors is that they must pursue their claims in the bankruptcy forum. The court, however, has the power to let them proceed in the nonbankruptcy forum where appropriate. Similarly, proceedings initiated by the government generally are not to be stayed, but can be in appropriate circumstances. To be sure, the Code does not compel the bankruptcy court to consider whether the courts normally defer to the type of agency action at issue in exercising its discretion. However, it does not preclude consideration of this factor. Courts thus would be well within their authority if they were to implement the analysis suggested by this Article.

Unfortunately, courts and commentators have taken a different path in explicating the precise contours of the (b)(4) exception. Section 362(b)(4) is written in capacious terms; few of the government's activities could not be described as flowing from either its police or regulatory power. Courts and commentators, however, generally have refused to give the language its full sweep. Specifically, the courts have developed two tests to determine whether a governmental proceeding falls within the (b)(4) exception. Whereas the analysis I propose flows

121. *Id.* § 105(a).

122. S. REP. NO. 989, 95th Cong., 2d Sess. 51, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5837.

123. Unfortunately, courts often fail to limit their consideration of stay issues to this question and inadvertently answer a second question: namely, whether the government's claim has priority over competing claims. For a discussion of this point, see Jackson, *Of Liquidation, Continuation, and Delay: An Analysis of Bankruptcy Policy and Nonbankruptcy Rules*, 60 AM. BANKR. L.J. 399, 419-20 (1986).

directly from a consideration of the normative underpinnings of both bankruptcy and administrative law, the judicially crafted tests fail to address these concerns.

The most commonly used test asks whether the primary purpose of the government's pursuit of the debtor is to protect its pecuniary interest. If it is, the (b)(4) exception does not apply, and the government then must pursue the debtor only in the bankruptcy forum. This test, formulated by the Eighth Circuit in *Missouri v. United States Bankruptcy Court*,¹²⁴ has its origin in remarks made by Senator DeConcini and Representative Edwards during the passage of the Code. They asserted that the (b)(4) exception "is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate."¹²⁵

There are three things to note about this "pecuniary interest" test. First, it finds no basis in the language of the Bankruptcy Code. Section (b)(4) speaks in terms of the nature of the government's power, not its motivation. One could stare at section 362(b)(4) for days and never have any inkling that the crucial inquiry is whether the government is attempting to protect the public fisc. The test cannot be justified by a simple citation to the Code.

The second problem with the pecuniary interest test is that it has no normative justification. Saying that the government's motivation should matter is a long way from justifying such a conclusion. While my use of the basic principles of administrative law provides a rationale for adopting its analysis, there is no bankruptcy reason for drawing the line that the pecuniary interest test creates. An example illustrates the point. All would agree that an employee who had exhausted her administrative remedies and was about to file suit in district court under Title VII¹²⁶ would have to pursue her claim in the bankruptcy arena once her employer filed for bankruptcy.¹²⁷ Yet if the

124. 647 F.2d 768, 775-77 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982).

125. 124 CONG. REC. S17406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6505, 6513; 124 CONG. REC. H11089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6436, 6444-45. Justice Scalia, consistent with his general attitude toward legislative history, recently has refused to rely on similar remarks in construing the Code. *See Begier v. IRS*, 110 S. Ct. 2258, 2267-69 (1990) (Scalia, J., concurring). For a persuasive counter-argument to Justice Scalia's disdain for legislative history, see Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990).

126. 42 U.S.C. §§ 2000a to 2000h-6 (1988).

127. *See, e.g., Revere Copper Prods., Inc. v. Hudson River Sloop Clearwater, Inc.*, 29

Equal Employment Opportunity Commission ("EEOC"), in processing the claim, decided to litigate on behalf of the claimant, the pecuniary interest test would allow the claim to go forward in United States district court.¹²⁸ In both cases, the claims are the same in that they require the court to decide whether the employer violated Title VII. The simple fact that the government would not be protecting its own pecuniary interest while the private employee might is not a good reason for resolving these identical claims in different forums.

My analysis would require the EEOC to pursue its claim inside of bankruptcy. This result intuitively makes sense. There is no reason to suppose that the bankruptcy forum suddenly becomes inappropriate because the EEOC becomes the litigant. The courts that have allowed the EEOC to continue its action outside the bankruptcy forum have offered no reason for this differential treatment other than the naked assertion that the government was not attempting to protect its pecuniary interest.¹²⁹

A formalistic response to this criticism might be that (b)(4) speaks only of governmental entities; that while private individuals may also be enforcing public policy, they simply cannot be shoehorned into the language of section 362(b)(4). This response rings hollow. Having jettisoned the language of the Code in fashioning the pecuniary interest test, it makes little sense to fall back on it in attempting to justify the results the test produces.

The final difficulty with the pecuniary interest test is a practical one—it is by no means easy to apply.¹³⁰ Part of this difficulty arises from that fact that the pecuniary interest test raises, but does not answer, the question of whose motivation counts. It fails to distinguish between the motivation of the legislature which passed the legislation¹³¹ and that of the official(s) attempting to enforce it. To be sure, one arbitrarily could pick one or the other, but this hardly justifies the choice. In any event, as Justice Kennedy recently noted, an inquiry

Bankr. 584, 588 (Bankr. S.D.N.Y.), *aff'd*, 32 Bankr. 725 (S.D.N.Y. 1983) (private actions based on private attorney general rationale not eligible for (b)(4) treatment).

128. See, e.g., *EEOC v. Hall's Motor Transit Co.*, 789 F.2d 1011, 1013-14 (3d Cir. 1986); *EEOC v. Rath Packing Co.*, 787 F.2d 318, 324-25 (8th Cir.), *cert. denied*, 479 U.S. 910 (1986).

129. *Hall's Motor Transit Co.*, 789 F.2d at 1013-14; *Rath Packing Co.*, 787 F.2d at 324-25.

130. See Note, *The 1978 Bankruptcy Reform Act's Police or Regulatory Power Exemption to the Automatic Stay: Unnecessary, Unfounded, and Unrestrained*, 29 WM. & MARY L. REV. 855, 856 (1988) (authored by Robert E. Korroch) ("Various courts interpreting the same statute and legislative history have arrived at astonishingly divergent applications of the law.").

131. If such a thing as congressional intent can be said to exist in a meaningful sense. See Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871-72 (1930).

into the government's motivation "would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding."¹³²

The most troubling feature of the pecuniary interest test is its implicit assumption that bankruptcy courts somehow are incapable of assessing nonpecuniary interests. This assumption must underlie the pecuniary interest test; otherwise there would be no point in allowing the nonbankruptcy forum to render a judgment which oftentimes cannot be enforced outside of the bankruptcy forum.¹³³ Yet bankruptcy courts have no inherent shortcoming that would suggest such a limitation. Indeed, bankruptcy courts regularly assess nonpecuniary interests.¹³⁴ One must identify what it is about the government's interest, pecuniary or otherwise, that calls the bankruptcy court's competence into question and justifies resort to the nonbankruptcy forum. In sum, the judiciary's use of the pecuniary interest test to demarcate the limits of the (b)(4) exception has little to commend itself.

132. *United States v. Halper*, 490 U.S. 435, 453 (1989) (Kennedy, J., concurring). As an illustration of this problem, consider the ruling in *In re Commonwealth Cos.*, 80 Bankr. 162 (Bankr. D. Neb. 1987), *rev'd*, 913 F.2d 518 (8th Cir. 1990). Prior to the debtors' bankruptcy filing, the government brought suit against them and five other defendants under the civil fraud provisions of the False Claims Act, Pub. L. No. 97-258, 96 Stat. 877, 978-79 (1982) (codified as amended at 31 U.S.C. § 3729-31 (1988)). The debtors then filed for bankruptcy. The government filed for relief in the bankruptcy court, arguing that it was exempt from the stay under the (b)(4) exception, and in the alternative that the court should lift the stay under 362(d) because the nonbankruptcy proceedings soon would go to trial. The bankruptcy court, using the pecuniary interest test, held that the (b)(4) exception did not apply to the False Claims Act suit, and that concerns of judicial economy are not "sufficient[ly] compelling circumstances to lift the stay." *Commonwealth Cos.*, 80 Bankr. at 166.

At first blush, the court's application of the pecuniary interest test seems correct. After all, the government was suing the debtor for money damages. It appears that the government was protecting its pecuniary interest. Yet there is another interest at stake: the public's interest in deterring those who might be tempted to defraud the government. It cannot be denied that the public has a legitimate—and nonpecuniary interest—in seeing that those who deal with the government deal with it fairly. The bankruptcy court offered no criteria for assessing whether the first interest dominates the second. Moreover, it is unclear why the fact that the government was pursuing an interest unrelated to its pocketbook was not in and of itself sufficient to exempt the suit from the automatic stay.

Equally troubling is the court's refusal to consider concerns of judicial economy. It is just such concerns that as a general matter force nonbankruptcy actions into bankruptcy once a petition is filed. *See supra* notes 36-38 and accompanying text. This being the case, it makes little sense to jettison these considerations in deciding whether or not to lift the stay.

133. This is the case when the EEOC brings suit under Title VII against a debtor who faces liquidation. The only possible relief in this situation is monetary (back pay), which clearly cannot be enforced by virtue of § 362(b)(5).

134. *See, e.g., In re Federal Press Co.*, 116 Bankr. 650, 653-54 (Bankr. D. Ind. 1989) (court estimates probable tort award, including pain and suffering); *In re Attlebrook Properties*, 37 Bankr. 338, 340 (D. Mass. 1983) (court estimates probable award for breach of contract, sex discrimination, and infliction of emotional distress).

Some courts have used a second test to determine whether or not the government action at issue falls within the (b)(4) exception. This test asks whether the proceeding at issue attempts to enforce a "public policy."¹³⁵ This test does correct some of the shortcomings of the pecuniary interest test, such as the lack of a statutory foundation and the difficulty of application. Yet it too fails to withstand scrutiny. Almost every suit, regardless of the identity of the litigants, promotes some public policy. Few would contest that this is true in the case of private actions under Title VII. But it is also true of routine private disputes, such as contract actions. The government heavily subsidizes the enforcement of contracts by providing a mechanism to ensure that disputes are resolved and that recalcitrant parties are forced to adhere to the deals they have made. Enforcing contracts, compensating those injured by others' negligence, and resolving property disputes all are part of the nation's "public policy." As previously noted, however, it is not feasible to have bankruptcy simply stay all debt collection efforts pending resolution of all disputes outside the bankruptcy forum.¹³⁶ That the government is enforcing a "public policy" thus does not seem to be an adequate reason for allowing it to escape the strictures of bankruptcy's automatic stay provisions.

The unsatisfying nature of these proffered methods of interpreting (b)(4) stems from their failure to ask why the government should be allowed to proceed against the debtor outside of bankruptcy. Examining the issue in light of the previous discussion, it becomes apparent that the courts err in focusing either on the nature of the governmental interest or on whether there is a public policy involved. The question that they *should* focus on is the extent to which substituting the bankruptcy forum for the nonbankruptcy forum alters the substance of the dispute. By doing this, courts can give meaning to both the (b)(4) exception and to their discretionary powers under sections 362(d) and 105(a).

As mentioned earlier, the automatic stay contains another exception that explicitly mentions the government: section 362(b)(1), which allows all criminal proceedings against the debtor to go forward. This provision, to the extent that it applies to corporate debtors, conflicts with the normative integration of the government into the bankruptcy process. Applying (b)(1) to corporate cases leads to unsatisfactory results, as is easily demonstrated. The False Claims Act

135. See *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 833-34 (9th Cir. 1991); *Eddleman v. United States Dep't of Labor*, 923 F.2d 782, 790-91 (10th Cir. 1991); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 941-43 (6th Cir. 1986).

136. See *supra* notes 38-39 and accompanying text.

has both civil and criminal components.¹³⁷ While the standard of proof differs depending on the context, there is no reason to believe that the bankruptcy court is less able to consider one standard than the other. To be sure, (b)(1) works perfectly well in the great majority of bankruptcy cases—those involving individual debtors. In the case of the corporate debtor, however, courts should exercise their discretion to allow the proceeding to take place in the bankruptcy forum, or Congress should amend (b)(1) to exclude corporate debtors.

The proper treatment of prepetition disputes between the government and the debtor thus is clear. If the government seeks to take action to which a court would normally defer, the bankruptcy court should allow the government to take that action. If, however, the government merely wishes to bring suit in another judicial forum, there is no reason that the government should not be treated as a private creditor. Although the Code allows for the implementation of this result, courts have gone astray by focusing on matters that have little relevance to the question at hand.

C. Postpetition, Preconfirmation Conduct

In this section I consider the last time period during which a debtor's conduct may lead it into a dispute with the government: namely, after the petition has been filed but before the bankruptcy process has ended.

(1) *Bankruptcy Theory*

If a bankruptcy proceeding could be conducted instantaneously, determining which actions should be forced into bankruptcy's collective proceeding would be relatively straightforward. All actions based on postpetition conduct would be resolved in the nonbankruptcy forum according to nonbankruptcy law, while actions based on prepetition conduct would be resolved in bankruptcy so long as the bankruptcy forum provided an adequate method of resolving the dispute. Where the bankruptcy forum proved inadequate, the nonbankruptcy forum would resolve the merits of the dispute.

In fact, however, bankruptcy proceedings take time to complete. The question thus arises as to the proper forum for resolving disputes based on the debtor's conduct while in bankruptcy. Once again, consider the case of the private creditor. The difficulty here is that there

137. See 18 U.S.C. § 287 (1988) (criminal False Claims Act); 31 U.S.C. §§ 3729-3732 (1988) (Civil False Claims Act).

are in fact two different types of disputes that may arise. The first, and most common, is the one in which the creditor is seeking to recover money for the debtor's conduct while in bankruptcy. As an illustration of this situation, consider the case where one of the debtor's trucks hits claimant the day after the debtor filed for bankruptcy. Claimant asserts that the driver of the truck was negligent and was acting in the scope of her employment. The debtor disputes both assertions.

Clearly, had the accident happened the day before the debtor filed for bankruptcy, the bankruptcy court would be the appropriate forum in which to litigate the dispute.¹³⁸ Conversely, had the accident happened the day after the bankruptcy proceeding concluded, the dispute would have to be resolved in the applicable nonbankruptcy forum. In our situation, however, the accident occurred neither before the petition was filed nor after the bankruptcy case had concluded. Though we now have a third situation, we still have the choice of two alternative forums: bankruptcy and nonbankruptcy. Choosing between these two, however, is not difficult. Consider the case of a debtor who is going to be liquidated. In this case, there is little reason to resolve the dispute in the nonbankruptcy forum. Allowing the bankruptcy forum to resolve it gives rise to the administrative savings that justify such a resolution in the case of the prepetition creditor. The only change in analysis occurs if one concludes that the claimant should receive an administrative expense priority, giving the claimant priority over all prepetition unsecured creditors.¹³⁹ If the claimant is given priority, then the dispute may involve real dollars rather than the few pennies on the dollar that unsecured claimants normally receive. Yet the savings that result from not delaying the resolution of the bankruptcy proceeding and from reducing the number of forums in which the debtor must litigate still argue for resolution of the dispute inside of bankruptcy.

This analysis remains the same in the case where the debtor will emerge from bankruptcy. The debtor's plan of reorganization must take account of the claimant's interest in the firm, regardless of whether

138. For claims arising before bankruptcy, the court may either set the amount of the claim, 11 U.S.C. § 502(b) (1988), or estimate the amount of the claim, *id.* § 502(c).

139. See *Reading Co. v. Brown*, 391 U.S. 471, 483 (1968). One can attack the normative justification of giving postpetition tort creditors, as opposed to consensual creditors, an administrative expense priority. See T.H. JACKSON, *LOGIC AND LIMITS*, *supra* note 9, at 154-56. If one concluded that postpetition tort claimants should be treated the same as prepetition tort claimants, it is clear that the dispute should be resolved in the bankruptcy forum. The analysis as to consensual creditors, who have to be given priority to induce them to deal with the debtor, would be the same as in the text.

it is given priority. Thus, the savings that will result from having the debtor litigate in one forum and from not delaying the conclusion of the bankruptcy proceeding dictate that the claimant's dispute with the debtor be resolved in the bankruptcy arena.

Before examining the proper treatment of the government, it is necessary to consider a different situation that may arise while the debtor is in bankruptcy—the case where a private party wants to prevent the debtor from engaging in certain future conduct. Assume that after the debtor has filed for bankruptcy, one of its factories begins to emit a terrible noise. Assume further that under state law, Homeowner, who lives next to the factory, has an action for abatement. In this scenario, part of the rationale for supplanting the nonbankruptcy forum evaporates. As in the case of the tort claimant who receives an administrative expense priority, we are no longer talking about a fractional payout. If the debtor is ordered either to abate its current activities or to engage in new ones, its expenses must be paid in full—at a hundred cents on the dollar.

Unlike the case of the tort claimant, however, allowing those seeking injunctive relief to proceed in the nonbankruptcy forum does not necessarily threaten the efficacy of the collective proceeding. To be sure, it probably still is cheaper for the debtor to litigate in one forum rather than two. Allowing the nuisance litigation to proceed in the nonbankruptcy forum, however, is unlikely to threaten the successful resolution of the bankruptcy proceeding. Although there may be isolated cases where the difference between reorganization and liquidation turns on the ability of the debtor to engage in some specified conduct, most disputes do not implicate such concerns. For example, many actions for prospective relief involve claims by workers who seek reinstatement on the grounds that they were discharged in violation of Title VII. In such cases, it would only delay completion of the bankruptcy proceeding to have the bankruptcy court litigate the Title VII claim.

Thus, in the case of prospective relief, the presumption should be that the dispute will be resolved by the nonbankruptcy forum. This presumption can be overcome by a showing that the resolution of the dispute will impact heavily on the ultimate resolution of the bankruptcy proceeding.

One note of caution must be added regarding the distinction between those with retrospective claims and those with prospective claims. Oftentimes, one can be converted to the other through clever pleading. For example, an action seeking the cost of cleaning up a site polluted during bankruptcy could either be a claim for money damages or a

suit for an injunction ordering the debtor to clean up the site. To ferret out true prospective relief cases, it is helpful to ask whether the party seeking relief still would be before the court if the debtor's operations had been shut down, its assets sold for scrap, and distribution of the monies generated by the sale was the only task left for the bankruptcy court. If so, then the party is seeking relief based on the debtor's completed conduct and should be treated as any other claimant. If liquidation would eliminate the party's complaint, then it is seeking prospective relief, and its suit should be heard in the appropriate non-bankruptcy forum.

With the rules governing the treatment of the private creditor firmly in mind, the case where the government sues the debtor based on its conduct while in bankruptcy can be considered. Where the government pursues the debtor for monetary damages or its equivalent, the analysis is identical to that sketched out in section B of this Part; where the proceeding is in the administrative forum, and courts normally would defer to that forum's decision, the proceeding should remain there. In this situation, it is impossible to translate the non-bankruptcy right into the bankruptcy forum. However, once the dispute moves to the judicial battlefield, the presumption should be that it will be handled in the collective proceeding.

In addition, where the government seeks only prospective relief, the baseline should be, as it is in the case of the private creditor, that the litigation will continue outside of bankruptcy. Where the non-bankruptcy forum is administrative rather than judicial, this presumption is even stronger than in the private context. In this situation, the added factors of administrative expertise and political accountability require an absolute rule that the proceeding remain outside of the collective proceeding.

(2) The Code and Case Law

The Bankruptcy Code as currently written follows the above analysis only in part. Nothing in the Code purports to stay attempts to pursue the debtor outside of bankruptcy for conduct engaged in after the filing of a bankruptcy petition. The automatic stay only reaches attempts to enforce a claim which arose before the petition was filed.¹⁴⁰ The Code thus not only allows suits seeking prospective relief to go forward outside of bankruptcy, but also allows nonbankruptcy forums to resolve all disputes based solely on the debtor's postpetition conduct.

140. See 11 U.S.C. § 362(a) (1988).

Despite this relatively clear line established by the Code, bankruptcy courts on occasion have asserted jurisdiction over proceedings involving the debtor's postpetition conduct. In two recent decisions, in fact, bankruptcy courts have asserted jurisdiction where the matter should have been left in the nonbankruptcy forum. The first of these cases involved the bankruptcy of the MCorp holding company, which found itself in bankruptcy as a result of the Texas banking crisis.¹⁴¹ MCorp is a holding company which owns both banking and non-banking subsidiaries. Because of failing real estate loans, the Federal Reserve Board took over most of MCorp's banking subsidiaries.¹⁴² The Board then initiated administrative proceedings against MCorp. One aspect of these proceedings involved allegations that MCorp had violated the self-dealing restrictions of federal banking law; the other involved an attempt to force MCorp to comply with the Board's regulation providing that the holding company be a "source of financial strength" to its subsidiary banks.¹⁴³ MCorp sought to enjoin these proceedings on the ground that enforcement of the Board's regulation would interfere with the bankruptcy process.

The district court granted MCorp's requested injunction. The court noted that "[p]reclusion by the bankruptcy forum . . . would restrict the Board's supervision of MCorp's asset allocation, intra-group transactions, and third-party contracts."¹⁴⁴ In granting the injunction, the court concluded that its duty under the Code was to "evaluate the function of the regulation, the probability of direct public harm, the opportunity for the public interest to be effectively represented in the bankruptcy proceeding, and the relation between the regulation and the financial, legal, and structural requirements for an effective reorganization."¹⁴⁵ In other words, the court undertook to balance what it perceived as the conflicting goals of banking regulation on the one hand, and the bankruptcy process on the other.¹⁴⁶

The court's analysis contains two errors. The first is its conclusion that a conflict exists between bankruptcy policy and banking policy. To be sure, it may be easier for a bank holding company to reorganize if it does not have to comply with the legal regulations governing bank-

141. *In re MCorp*, 101 Bankr. 483, 485 (S.D. Tex. 1989), *rev'd sub nom.* MCorp Fin. v. Board of Governors Fed. Reserve Sys., 900 F.2d 852 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 1101 (1991).

142. *Id.* at 485.

143. *Id.*

144. *Id.* at 487.

145. *Id.* at 489.

146. *See id.* at 490 (court characterizes its order as an "accommodation of the two national interests in bankruptcy and banking").

ing entities. This fact, however, does not implicate bankruptcy policy. Bankruptcy policy, properly focused, should be limited to solving the collective action problem that arises when a debtor's liabilities exceed its assets. Bankruptcy should not be a haven from the rigors of the marketplace.¹⁴⁷

The *MCorp* court's decision suffers from a second defect as well. In ousting the Board of jurisdiction, the court attempted to mollify concerned regulators by noting that it would "prevent individual or collusive efforts to evade the Debtor's responsibilities to the public."¹⁴⁸ The court apparently believed it could perform the responsibilities entrusted to the Board. While one may admire the court's attempt to ensure that the debtor's "responsibilities" are fulfilled, the fact is that the court is not institutionally competent to discharge this function. Congress established the Board as the expert regulator in this area; it is not possible to shift this task to the bankruptcy court without altering the contours of nonbankruptcy law.

The bankruptcy court committed a similar error in the recent case of *In re Public Service Co.*¹⁴⁹ The Public Service Company of New Hampshire ("PS New Hampshire") was a public utility supplying electrical service. Like most government-sanctioned monopolies, it was a profitable venture. The firm, however, had the misfortune to invest heavily in the star-crossed Seabrook nuclear power plant. The plant became one of the primary targets of antinuclear opposition in this country, and only recently has received regulatory approval to begin operations. This delay in bringing Seabrook on line created severe financial problems for PS New Hampshire. New Hampshire law prohibits the company from charging its customers for monies spent on incomplete projects. This prohibition, coupled with the amount of money PS New Hampshire had "invested" in Seabrook, left the utility company unable to meet its obligations, and thus forced it to file for reorganization.¹⁵⁰

147. In *In re Buttonwood Partners, Ltd.*, 111 Bankr. 57 (Bankr. S.D.N.Y. 1990), the bankruptcy court made the same mistake:

[T]his Court finds that its jurisdiction and power over the debtor's estate takes precedence over the authority vested in the [Office of Thrift Supervision]. . . . A result which would preclude this court from considering a balancing with respect to the application of the specific regulations that *may* be implicated, would interfere with the ability of this Debtor to effectively reorganize under Chapter 11 and contradict the 'fresh-start' policy which underlies the Code.

Id. at 61 (emphasis in original).

148. *MCorp*, 101 Bankr. at 489.

149. 88 Bankr. 558 (Bankr. D.N.H. 1988)

150. *Public Serv. Co.*, 88 Bankr. at 559-560.

PS New Hampshire filed a plan of reorganization designed to circumvent the restrictions imposed by New Hampshire law. The proposed plan would have transformed PS New Hampshire from a single entity into a holding company owning three separate subsidiaries.¹⁵¹ One of these subsidiaries would generate and transmit electricity. A second would be the retail distributor of the electricity. The third would control the planning, engineering, accounting, and financial support services for the other two entities. Creating the first two entities would allow the utility company to sell its electricity wholesale from the first to the second subsidiary. Such wholesale electricity transactions are regulated by the Federal Energy Regulatory Commission ("FERC") rather than the New Hampshire Public Utilities Commission.¹⁵² Unlike New Hampshire law, the applicable federal regulations would have allowed the utility to charge its customers for a portion of the costs of the Seabrook plant before the plant was operational.¹⁵³

Had PS New Hampshire attempted such a reorganization outside of bankruptcy, it would have had to obtain approval from the New Hampshire Public Utilities Commission.¹⁵⁴ State law allowed the Commission to grant approval where it determined the change in structure would be in the "public interest."¹⁵⁵ The utility argued that the bankruptcy court could invoke section 1123(a)(5) of the Code, and approve the proposed reorganization, without requiring the utility to obtain the necessary state consent. Section 1123(a)(5) provides that "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . provide adequate means for [its] implementation"¹⁵⁶

The bankruptcy court began its analysis of PS New Hampshire's plan by examining the historical treatment of regulated industries in bankruptcy.¹⁵⁷ Under the old Bankruptcy Act, when an intrastate utility filed for bankruptcy, its plan of reorganization could be approved only if the governing regulatory body consented.¹⁵⁸ The only provision of the 1978 Code speaking to the treatment of regulated industries is section 1129(a)(6), which requires regulatory approval for rate in-

151. *In re Public Serv. Co.*, 108 Bankr. 854, 860 (Bankr. D.N.H. 1989).

152. *Id.*

153. *Id.* at n.4.

154. *Id.* at 860.

155. See N.H. REV. STAT. ANN. § 369:1 (1984) (issuance of securities approved only if consistent with public good); *Petition of New Hampshire Gas & Elec. Co.*, 88 N.H. 50, 57, 184 A. 602, 607 (1936) (goal of statute is to avoid overcapitalization contrary to public interest).

156. 11 U.S.C. § 1123(a)(5) (1988).

157. *Public Serv. Co.*, 108 Bankr. at 863-66.

158. U.S.C. § 578 (repealed 1979).

creases.¹⁵⁹ As initially enacted, section 1123(a)(5) did not have the "notwithstanding" language.¹⁶⁰ This language was added in 1984, in what was labelled a "technical amendment."¹⁶¹

The court thus concluded that the "plain language" of section 1123(a)(5) allowed it, over the state's objections, to approve a plan of reorganization transferring regulatory authority to FERC.¹⁶² The court stated that "issues dealing with imminent threats to public *health* and *safety* are accorded overriding importance notwithstanding bankruptcy proceedings."¹⁶³ The court found, however, that less solicitude was necessary where "economic regulation" was at issue.¹⁶⁴ The court also opined that it was capable of considering the public interest.¹⁶⁵

As my prior analysis has made clear, the bankruptcy court's decision cannot be justified on a normative level. The court believed that its consideration of the public interest was an adequate substitute for the utility commission's determination of the public interest. Yet it is the New Hampshire regulatory commission, not the bankruptcy court, which was created to become an expert in the field and determine what is in the public interest. Only if the standard framework of administrative law is ignored can it be asserted that a bankruptcy court is a competent substitute for an administrative agency.

Though the court can be faulted for viewing itself as an adequate substitute for the utilities commission, its statutory argument is not without some force. The language of the Code does say "notwithstanding."¹⁶⁶ This argument, however, is not as strong as it might first appear. It is not clear that the language of section 1123(a)(5) commands the court's result. Section 1123(a)(5) does not say that the bankruptcy court is free to ignore nonbankruptcy law in approving a plan of reorganization. Rather, it sets forth various changes that a plan may effect, such as the merger of the debtor with another entity, the amendment of its charter, and the sale of the debtor's property free of any lien.¹⁶⁷

The considerations that have been stressed in this Article suggest why these actions can be taken notwithstanding nonbankruptcy law.

159. 11 U.S.C. § 1129(a)(6) (1988).

160. See 11 U.S.C. § 1123(a)(5) (1979, repealed 1984).

161. See S. REP. NO. 65, 98th Cong., 1st Sess. 81 (1983); 130 CONG. REC. S8887, 8888 (daily ed. June 29, 1984).

162. *In re Public Serv. Co.*, 108 Bankr. 854, 874-80 (Bankr. D.N.H. 1989).

163. *Id.* at 870 (emphasis in original).

164. *Id.*

165. *Id.* at 873.

166. 11 U.S.C. § 1123(a)(5) (1988).

167. See *id.*

These are actions that the debtor has the ability to take on its own initiative, outside of bankruptcy, so long as it complies with certain procedural requirements. These procedures, however, are adequately duplicated in the collective proceeding, something which is not true of the requirement of obtaining the approval of the state regulatory commission. This argument is bolstered by section 1129(a)(6), which requires that any rate change be approved by the appropriate regulatory body.¹⁶⁸ It is clear that PS New Hampshire was, through its plan of reorganization, attempting to procure a rate change in the sense that the new plan would allow it to charge its customers higher rates.

Regardless of whether one accepts this statutory argument, the more important point is that the court's decision transgresses the proper relationship between bankruptcy and the administrative state.

Conclusion

The extant scope of the administrative state ensures that public law will intrude upon the conduct of private firms. This intrusion is not magically eliminated by the expedient of filing a bankruptcy petition. The extent to which such an action should transfer governmental disputes involving a debtor into the bankruptcy arena turns on a careful consideration of the relative institutional competence of the bankruptcy court and the competing forum. Where the competing forum is another court, the bankruptcy court is equally equipped to resolve the issue. While at times there may be reasons for allowing the litigation to proceed outside of bankruptcy, institutional competence is not one of those reasons. Where the competing forum is an administrative agency whose decisions receive deference by reviewing courts, bankruptcy courts are not designed to replicate the agency's decisionmaking process. Any attempt to translate such disputes into bankruptcy necessarily changes the substantive law at issue. The concerns of expertise and political accountability encompassed in the notion of deference to agency decisions are best served, and bankruptcy goals are not ill served, by allowing these disputes to be resolved in the administrative forum.

168. *Id.* § 1129(a)(6).